

NO. 47968-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RUSLAN BEZHENAR,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

The Honorable James W. Lawler, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain the appellant's conviction for criminal trespass in the first degree.

2. The trial court erred when it denied appellant's motions to dismiss the criminal trespass charge for insufficient evidence.

3. The appellant was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

4. Defense counsel was ineffective for failing to properly raise a defense based on a reasonable belief that he was licensed or authorized to be in the building posted by a municipality as "uninhabitable" and closed to "unauthorized persons."

5. Defense counsel was ineffective for failing to propose instructions necessary to the reasonable belief of license or authorization to be in the building.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Appellant Ruslan Bezhenar was convicted of one count of first degree criminal trespass. Was the evidence insufficient to sustain Mr. Bezhenar's conviction for first degree criminal trespass where the evidence does not support a finding that he was not authorized by the owners to enter the building for

the limited purpose of retrieving personal belongings where the building was posted as “uninhabitable” by the city? Assignment of Error 1.

2. Did the trial court err in denying appellant's motion to dismiss the criminal trespass charge where the State failed to show appellant was “unauthorized” to enter the building for a limited purpose of obtaining his stored belongings? Assignment of Error 2.

3. The appellant’s attorney did not seek instructions necessary to the defense of reasonable belief that he was authorized to enter the building. Was the appellant denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel? Assignments of Error 3, 4, and 5.

C. STATEMENT OF THE CASE

1. Procedural history:

Ruslan Bezhenar was charged by amended information filed November 21, 2012 in Lewis County Superior Court with felony harassment—threat to kill, in Count 1, and criminal trespass in the first degree in Count 2. Clerk’s Papers (CP) 10-12. Following a jury trial on November 28 and 29, 2012, Mr. Bezhenar was convicted of felony harassment as charged in Count 1. CP 38. The jury was deadlocked regarding Count 2 and

a mistrial was declared on November 29, 2012. Report of Proceedings¹ (RP) (11/29/12) at 178; CP 84.

A judgment and sentence for the harassment conviction was entered January 9, 2013, and a stay pending an appeal was simultaneously filed. CP 42-54.

Mr. Bezhenar appealed the harassment conviction, and the case was transferred to Division 1. The Court reversed the conviction on the basis of prosecutorial misconduct and remanded the charge to the trial court for new trial.² A mandate was filed October 15, 2014. CP 55. An order to vacate the conviction and set for new trial was entered November 7, 2014. CP 79. The trial court set a new out of custody commencement date of November 7, 2014 and the matter was set for trial in January, 2015. RP (11/26/14) at 2.

Mr. Bezhenar was tried by a jury on both counts a second time starting January 21, 2015, the Honorable James W. Lawler presiding.

No motions regarding CrR 3.5 or CrR 3.6 were argued in either trial. RP (11/28/12) at 5-6. At trial, the defense argued that Mr. Bezhenar's entry

¹The record of proceedings consists of the following hearings: November 28, 2012 (day 1, first trial), November 29, 2012 (day 2, first trial), November 7, 2014, November 20, 2014, November 26, 2014, December 18, 2014, January 15, 2015, January 20, 2015, January 21, 2015 (day 1, second trial), January 22, 2015, (day 2, second trial), January 23, 2015 (day 3, second trial), January 26, 2015 (day 4, second trial), January 29, 2015, February 12, 2015, March 5, 2015, May 7, 2015, July 9, 2015, and August 5, 2015 (sentencing).

² *State v. Bezhenar*, No. 71646-8-I, slip op. (Wn.App. June 16, 2014).

into the building was lawful because his parents—who are the owners of the building—gave authorization to go into the building, because he was there solely to pick up clothing he had stored there, and that the prohibition against entry by the city was not absolute. RP (1/23/15) at 364-66. The defense attorney did not propose any jury instructions to support this theory. CP 128-155.

Just as the jury did in 2012, the jury deadlocked a second time, this time regarding felony harassment. The jury found him guilty, however, of first degree criminal trespass. RP (1/26/15) at 399; CP 157, 158, 159.

The case came on for arraignment on a second amended information regarding felony harassment on January 29, 2015. RP (1/29/15) at 3-4. The charge was subsequently dismissed by the State pursuant to a plea agreement. RP (8/5/15) at 3; CP 169.

Mr. Bezhenar was sentenced on the charge of first degree criminal trespass to 364 days with 316 days suspended, and with credit for 48 days served. RP (8/5/15) at 3-6.

Timely notice of appeal was filed August 14, 2015. CP 179-89, 190-95. This appeal follows.

2. Testimony presented at second trial:

On July 13, 2012 Centralia police were dispatched to a report of a

man climbing a drain pipe leading to the second story of a closed business located in the 700 block of West Main Street in Centralia, Washington. RP (1/21/15) at 23, RP (1/22/15) at 109. The building consisted of an unoccupied storefront and an upstairs apartment. RP (1/21/15) at 25. The front door of the building was posted on July 9, 2012 by the City of Centralia with a notice stating that the building was “unfit for habitation” and “unauthorized persons on the premises would be prosecuted.” RP (1/21/15) at 25, RP (1/22/15) at 109, 134. The notice stated in full:

This structure has been deemed unfit for habitation per CMC Title 18. Any unauthorized person found within these premises is subject to arrest and prosecution to the full extent of the law. Removal of the sign is a gross misdemeanor and is punishable by a fine of \$900 and one year in jail. Centralia Building Department.

Exhibit 8. RP (1/21/15) at 28.

The notice was posted by the city because the building did not have utilities including water and electricity. RP (1/21/15) at 25.

Several officers responded to the neighbor’s report, established a perimeter around the building, and announced their presence. RP (1/21/15) at 29, 32. The neighbor who called the police did not see anyone leave the building. RP (1/21/15) at 29.

Despite repeated announcements by different officers, the police

received not response from any person inside the building. RP (1/21/15) at 32-33. Officers saw a female through a window located in the back of the building. RP (1/21/15) at 32, RP (1/22/15) at 160. The police shouted for her to open the window, but she locked the window and then walked out of view of the police. RP (1/22/15) at 161, 176. Eventually, two females left the building from a side door of the building after police announced that they were going to call for a K-9 unit. RP (1/21/15) at 34. The women—identified as Shannon West and Breanna Carothers—both exited from a door on the east side of the building and were arrested for trespassing. RP (1/21/15) at 35, RP (1/22/15) at 114. The women had apparently locked the door the building as they exited. RP (1/22/15) at 177.

Based on the report from the neighbor, police believed that a male still remained in the building. RP (1/22/15) at 116. A fire truck was dispatched to the scene and a ladder was placed on a second floor metal awning on the north side of the building to gain access to a second story window. RP (1/21/15) at 36-37, RP (1/22/15) at 117.

After climbing to the metal awning, Centralia Police Officer Michael Lowrey saw Ruslan Bezhenar in the building. RP (1/21/15) at 39. Mr. Bezhenar and a woman named Darcy Negrete were both located in the upstairs apartment and were subsequently placed in handcuffs. RP (1/22/15)

at 119. Officer Lowrey stated that Mr. Bezhenar was angry, argumentative and said that the police did not have the right to be there. RP (1/21/15) at 42. Officer Lowrey stated that Mr. Bezhenar was taken out of building through the upstairs window because the interior of the apartment had not been searched. RP (1/21/15) at 65. Mr. Bezhenar refused to leave through the window and Officer Lowrey physically pulled him out of the window onto the metal awning. RP (1/21/15) at 46. While on the awning the K-9 unit Lobo bit Mr. Bezhenar on the arm. RP (1/21/15) at 50.

No person was located in the premises other than Ms. Negrete and Mr. Bezhenar after the building was searched. RP (1/22/15) at 122. Ms. Negrete was cited for occupying a residence without utilities under Centralia Municipal Code 18.40.14A. RP (1/21/15) at 133.

Mr. Bezhenar received medical attention for the dog bite. After he was taken down the ladder, Officer Lowrey stated that Mr. Bezhenar made threatening statements to him. RP (1/21/15) at 54.

The building belongs to Mr. Bezhenar's parents, Galina and Yuriy Bezhenar. RP (1/22/15) at 191, 196. Police contacted Galina Bezhenar and she arrived at the scene and spoke with police, but she did not have a key to the building. RP (1/22/15) at 177, 189. She explained that her husband had a key, but he did not have a phone and he could not be reached in order to bring

the key. RP (1/22/15) at 177.

Galina Bezhenar testified through an interpreter that she and her husband bought the building at 708 West Main in Centralia in 2001. RP (1/22/15) at 206. She stated that her son Ruslan had previously lived in the upstairs apartment but had moved out. RP (1/22/15) at 206-07. She stated that her son had a key to the building which her husband had provided to him. RP (1/22/15) at 207. Ms. Galina said Ruslan was not living in the building at the time of incident in July, 2012, and that he was “just being there” when the police went into the building. RP (1/22/15) at 223, 224.

Mrs. Bezhenar said that she did not receive notification from Centralia that the building was deemed to be uninhabitable and did not recognize the notice in Exhibit 8. RP (1/22/15) at 208.

Darcy Negrete, who was found by police in the apartment on July 13, 2012, testified that she had been in the apartment for approximately five minutes when the police arrived. RP (1/22/15) at 231, 242.

Ruslan Bezhenar stated that he operated a used car lot for ten to twelve years at the location and lived in the apartment for approximately two years. RP (1/22/15) at 248. He stated that his parents allow him to have access to the building in order to retrieve tools and items that are stored there, and also to have access to his personal possessions such as clothing and

furniture remaining in the apartment. RP (1/22/15) at 261.

Mr. Bezhenar stated that he went to the building at approximately 2:00 or 3:00 p.m. on July 13, 2012 with his girlfriend in order to pick up some clothes. RP (1/22/15) at 248, 262. When he was there, he took a nap for 30 to 45 minutes and Darcy Negrete and Breanna Carothers came to the apartment when he was sleeping. RP (1/22/15) at 262. He fell asleep because it was a hot day and it was hot in the apartment because there is no air conditioning. RP (1/22/15) at 263. He was asleep when his father called, telling him that police called him in order to get into the building. RP (1/22/15) at 248, 267. He said that after his father called he looked out the window and was surprised to see police cars outside. RP (1/22/15) at 249. He said that he had his parents' permission to be in the building. RP (1/22/15) at 252. He denied that he climbed through a window and said that in any case, he had the keys to the building in his possession. RP (1/22/15) at 252. He stated that it was an acquaintance named Marcus Inman who was seen by the neighbor climbing the drainpipe. RP (1/22/15) at 253. He said that Mr. Inman, who is a friend of Ms. Carothers, had left by the time he woke up when his father called. RP (1/22/15) at 265.

3. Motion to Dismiss.

After the State's case-in-chief, defense counsel moved to dismiss the

criminal trespass charge, arguing the State failed to present sufficient evidence that Mr. Bezhenar was there unlawfully. RP (1/22/15) at 199. The motion was denied and counsel renewed the motion at the conclusion of the defense's case. RP (1/22/15) at 278-79. The court denied the motion, stating:

[t]hat would render a notice from the city that a building is not habitable, that would render that totally meaningless under your theory, it applies to everybody except the owner could say go ahead, you could be inside these premises despite what that notice says.

RP (1/22/15) at 279.

Counsel argued that the owner has right to go back to his property even if it has a notice saying that it was unfit for habitation, in order to clean the premises or do construction or repairs. RP (1/22/15) at 279-80. The court denied the motions to dismiss, stating that "entry is prohibited because of the condition of the property and the placard that's been placed on there by the City." RP (1/22/15) at 280.

The sign stating that unauthorized persons could not enter the building was apparently posted pursuant to Centralia Municipal Code 18.40.14.A. RP (1/22/15) at 133.³ Counsel argued that CMC was repealed in 2006, and therefore the city should not have posted the notice that it was uninhabitable. RP (1/22/15) at 133. Counsel moved to dismiss the charge of

³ Darcey Negrette was cited for violation of Centralia Municipal Code 18.40.14. RP

criminal trespass, arguing that the reason for the trespass charge was based on the notice, which was placed pursuant to an ordinance that was no longer in effect. RP (1/22/15) at 137. Counsel argued that the notice was dated four days from the incident, which occurred July 13, 2012. RP (1/22/15) at 137. The court sustained an objection by the State to questions about the Ordinance but did not rule on defense counsel's motion to dismiss. RP (1/22/15) at 138.

D. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. BEZHENAR'S CONVICTION FOR CRIMINAL TRESPASS WHERE THE EVIDENCE DOES NOT SUPPORT A FINDING THAT HE WAS NOT LICENSED TO ENTER THE BUILDING

A criminal defendant's constitutional right to due process requires the State to prove every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829

(1/22/15) at 133.

P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Thereoff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Criminal trespass in the first degree requires proof that the defendant knowingly entered or remained unlawfully in a building. RCW 9A.52.070. Appendix A. Here, the evidence, taken in the light most favorable to the State, does not support a finding that Mr. Bezhenar was not then licensed to enter his parents' building in order to retrieve personal possessions in storage when he lived in the apartment. The evidence shows that his parents had owned the building since 2001, that he had lived there in the recent past and that he still had possessions such as furniture and clothing stored there. Moreover, stated that he had a key to the building and had permission to be there from his parents.

The building was marked with a notice placed on the building on July 9, 2012, four days prior to the incident. The notice stated that the "structure has been deemed unfit for habitation" and that "any unauthorized persons found within these premises is subject to arrest and prosecution to the full extent of the

law.” Exhibit 8. No evidence was presented, however, that returning to the building for a limited purpose such as retrieving personal possessions is “unauthorized,” or that a limited, specific entry to the building during the day constitutes “habitation” of the premises.

The evidence is simply insufficient to support the jury's finding that Mr. Bezhenar was not then licensed to enter the building where he had permission by the owners to do so, and where there was no showing that a limited presence in the building—which had been posted for only a few days—was not contemplated by the CMC as an authorized purpose.

2. THE TRIAL COURT ERRED IN DENYING MR. BEZHENAR'S MOTIONS TO DISMISS WHERE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE.

In ruling on a motion to dismiss for insufficient evidence, the trial court does not weigh the evidence, but only examines the sufficiency thereof. *State v. Coleman*, 54 Wn. App. 742, 746, 775 P.2d 986 (sufficiency of the evidence is legally the same issue as insufficiency of the proof of a material element of the crime), rev. denied, 113 Wn.2d 1017 (1989). In reviewing a trial court's decision on a motion to dismiss, this Court applies the same standard as the trial court: that is, whether there is sufficient evidence that could support a verdict. *State v. Longshore*, 97 Wn. App. 144, 147, 982 P.2d

1191 (1999), *aff'd*, 141 Wn.2d 414, 5 P.3d 1256 (2000). Evidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt. *Id.*

As discussed above, the State was required to prove Mr. Bezhenar knowingly entered or remained unlawfully in the building. Mr. Bezhenar's motions to dismiss the charge centered on the State's failure to prove that his presence in the building was "unauthorized," and that the ordinance was repealed by the city in 2006. RP (1/22/15) at 134-35.

In any prosecution under RCW 9A.52.070, it is a defense that a defendant was licensed to enter the building by the owner of the premises. RCW 9A.52.090(3).

Here, Mr. Bezhenar was permitted to be in the building by his parents—the owners of the building. The city's notice prohibited "unauthorized" persons from being on the premises. It is not reasonable to believe, however, that the Code—assuming that it was in effect in 2012—creates a blanket prohibition against all persons from entering a posted building, including persons performing legitimate duties such as retrieving needed possessions. The Code clearly prohibits an owner or his or her designee from "inhabiting" a posted building. There is no reason to believe,

however, that an owner cannot return to a posted building for purposes such as making repairs, shutting off utilities, preventing waste, or in this case—to retrieve personal possessions from storage.

A good faith belief that one is entitled to be on the premises is also a defense to a charge of trespass:

In accordance with the general rule that the existence of a criminal intent is an essential element of a statutory offense, it is the rule in many jurisdictions that criminal intent is an essential element of the statutory offense of trespass, even though the statute is silent as to intent; and if the act prohibited is committed in good faith under claim of right or color of title, although accused be mistaken as to his right, unless it is committed with force or violence of a breach of the peace, no conviction will lie, the view taken being that it will not be presumed that the legislature intended to punish criminally acts committed in ignorance, by accident or under claim of right, and in the bona fide belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction.

State v. Batten, 20 Wn. App. 77, 79-81, 578 P.2d 896 (1978), quoting

People v. Johnson, 16 Mich. App. 745, 750, 168 N.W.2d 913, 915 (1969).

Here, Mr. Bezhenar was in the building in good faith under a claim of right. He had a key to the building and used a side entrance on the east side of the building for access to the apartment instead of the front door facing Main Street. The front door was posted but no evidence showed that the east side door was similarly posted. Moreover, Mr. Bezhenar's entry into the building was for a specific, reasonable purpose. A reasonable person would

not conclude that temporary entry into one's parent's property would constitute "unauthorized" use of a posted building.

For the reasons set forth above, the trial court erred by denying Mr. Bezhenar's motions to dismiss.

3. **MR. BEZHENAR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Bezhenar's counsel provided ineffective assistance by failing to fully raise the defense that Mr. Bezhenar reasonably believed that he had license to enter the property and failed to propose an instruction to support the argument.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

To be minimally competent, an attorney must research the relevant law. *Kylo*, 166 Wn.2d at 862. The accused is denied a fair trial when defense counsel fails to identify a key the defense available and present it to the jury. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009).

Counsel's failure to propose instructions on the defense theory prejudices the

accused if the jury is left with no recognition of the legal significance of the evidence. *Powell*, 150 Wn. App. at 156-57.

Mr. Bezhenar's defense attorney provided ineffective assistance by failing to properly raise the defense that he reasonably believed that he was authorized to be in the building.

In order to convict Mr. Bezhenar of first degree criminal trespass, the State was required to prove beyond a reasonable doubt that he unlawfully entered or remained in a building. RCW 9A.52.070. As noted in Section 2, *supra*, RCW 9A.52.090(3) provides a clearly defined statutory defense when:

[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.

Attachment A.

The reasonable belief defense is not an affirmative defense. *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005). Instead, it negates the element of unlawful entry or unlawful remaining. *Id.* (citing *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002)).

Here, Mr. Bezhenar's parents authorized him to be in the building. The front of the building was posted with the notice that unauthorized persons were prohibited from being on the premises. This necessarily implies that there is a category of persons who are authorized to be in the building.

Mr. Bezhenar's attorney argued in closing that the entry into the building was not unlawful and that he was an authorized person by dint of the permission by his parents to be there and because, assuming the Code was not repealed in 2006, it was reasonable to enter a building for purposes such as remedying the deficient condition by making repairs, or in this case picking up possessions. RP (1/23/15) at 364-69. Nevertheless, defense counsel did not propose WPIC 19.06 regarding the reasonable belief defense that he was "authorized" to be in the building. The instruction, which is specifically tailored to first degree criminal trespass, provides:

It is a defense to a charge of criminal trespass in the first degree that the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the *State* has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty *as to this charge*.

11A Washington Pattern Jury Instructions Criminal (WPIC) 19.06.

Defense counsel's failure to fully argue the defense fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Counsel had no reasonable strategic reason not to argue the available defense, more importantly, to request the instruction. An instruction on the reasonable belief

defense would not have placed any additional burden on the defense. *J.P.*, 130 Wn. App. at 895. Such an instruction would have made clear to the jury the State's burden of disproving the reasonable belief defense. Mr. Bezhenar's attorney provided deficient performance by failing to present the reasonable belief defense to the jury. *Powell*, 150 Wn. App. at 156.

Mr. Bezhenar was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. The evidence demonstrated that Mr. Bezhenar entered the property for a short period of time, that he did not intend to "inhabit" the property, and that he was there for a specific, limited purpose. Without an instruction on the reasonable belief defense, the jury was left with no awareness of the legal significance of that evidence. *Powell*, 150 Wn. App. at 156-57. Instead, the jury likely believed that they were required to convict Mr. Bezhenar regardless of his belief that his presence was reasonable and lawful, even in a building posted as "uninhabitable." Failure to properly raise the reasonable belief defense relieved the State of its burden to prove unlawful entry beyond a reasonable doubt. *J.P.*, 130 Wn. App. at 895.

There is a reasonable probability that defense counsel's deficient performance affected the outcome of this case. *Kyllo*, 166 Wn.2d at 862. Therefore, the conviction must be reversed. *Kyllo*, 166 Wn.2d at 862.

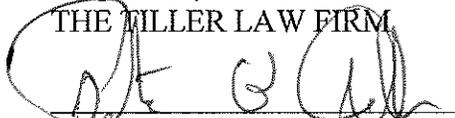
E. CONCLUSION

Mr. Bezhenar's conviction for first degree criminal trespass should be reversed and dismissed because the evidence is insufficient to sustain his conviction. In addition, defense counsel provided ineffective assistance by failing to properly raise the defense that it was reasonable to believe that he would have been authorized by the city to enter the building for the specific purpose of obtaining his personal possessions.

DATED: February 12, 2016.

Respectfully submitted,

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Of Attorneys for Ruslan Bezhenar

CERTIFICATE OF SERVICE

The undersigned certifies that on February 12, 2016, that this Appellant's Opening Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a true and correct copy e-mailed to Ms. Sara Beigh, Deputy Prosecuting Attorney, was mailed the appellant by first class mail, postage prepaid as follows: